



10-1-1950

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Recommended Citation

Paul J. Scheips, *Significance and Adoption of Article V of the Constitution*, 26 Notre Dame L. Rev. 46 (1950).

Available at: <http://scholarship.law.nd.edu/ndlr/vol26/iss1/3>

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THE SIGNIFICANCE AND ADOPTION OF ARTICLE V OF THE CONSTITUTION†*

I

When Congress proposes an amendment to the Constitution and sends it to the states for ratification, which it has done only infrequently,¹ the action receives considerable attention in the public press and brings in its wake a more-than-usual interest in the amending process. This occurred in 1947 when Congress sent to the states the proposed amendment to limit Presidential tenure.² Similarly much publicity occurred some months ago when the Senate passed, in rapid succession, the long-urged equal rights amend-

†Another aspect of the amending process will be dealt with in the Winter issue. It will be *The Constitutional Law of Constitutional Amendment* by Edward S. Corwin and Mary Louise Ramsey. [Editor's note.]

*The writer would like to acknowledge that this article probably would never have been written had it not been that Professor Harold M. Dorr of the University of Michigan interested him in the amending process while he was a graduate student in Ann Arbor.

¹ Of the 4,020 proposed amendments introduced in Congress from 1789 to 1941—an approximate list according to Edwin A. Halsey—only twenty-six have gone to the states for ratification, and of these only twenty-one have ever been ratified. HALSEY, *PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INTRODUCED IN CONGRESS FROM DECEMBER 6, 1926 TO JANUARY 3, 1941* 78 n. 1 (1941). Of the other five only one—the child labor amendment—can be said to be a live issue. It may be doubted, however, that the child labor amendment will ever be ratified, for although twenty-eight states had ratified it by 1937, none have ratified it since then.

For additional material on the history of proposed amendments to the Constitution, see: Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of Its History*, 2 REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896 (1897); *Proposed Amendments to the Constitution of the United States Introduced in Congress, December 4, 1889-July 2, 1926* (Tansill ed.), SEN. DOC. NO. 93, 69th Cong., 1st Sess. (1926); *Proposed Amendments to the Constitution, Monograph on the Resolutions Introduced in Congress Proposing Amendments to the Constitution of the United States of America* (Musmanno ed.), H. R. DOC. NO. 551, 70th Cong., 2d Sess. (1929).

² N. Y. Times, Mar. 22, 1947, p. 1, col. 8. This amendment has been ratified by twenty-four states to date. Chicago Sun-Times, May 18, 1950, p. 5, col. 2. The states have only until March, 1954 to ratify this amendment, since by its own terms the period of ratification is limited to seven years. For an interesting comment to the effect that this amendment might never be ratified, see Robichaud, *Inside Washington*, Chicago Sun, May 22, 1947, p. 8, cols. 7-8.

ment (in a watered-down form)³ and the Lodge-Gossett Joint Resolution to reform the existing machinery for electing the President and Vice President.⁴ The House, however, has not looked with favor upon these proposals.⁵

Since proposals to amend the Constitution—proposals to change legally the basic law—are fairly frequent occur-

³ The equal rights amendment, S. J. RES. 25, 81st Cong., 2d Sess. (1950), is favored by many women's groups (although not by all), and whose proponents have been urging its adoption for twenty-seven years, was first in the Republican Party platform in 1940, and in both major party platforms since 1944. In 1948 it was also in the Progressive Party platform. It was passed by the Senate on January 25, 1950, by a vote of 63 to 19, but not without the crippling Hayden amendment which provides that it should "not be construed to impair any rights, benefits, or exceptions now or hereafter conferred by law upon persons of the female sex." Some recent material on the subject can be found in Furman, *Senate Votes Equal Rights, but Retains Women's Laws*, N. Y. Times, January 26, 1950, p. 1, col. 5; Evansville (Indiana) Courier, February 11, 1950, p. 6, col. 1; 96 CONG. REC. 1097 (Jan. 30, 1950).

⁴ The Lodge-Gossett proposal, S. J. RES. 2, 81st Cong., 2d Sess. (1950), abolishing the electoral college and providing for the pro-rating of state electoral votes in proportion to the popular vote, was introduced in the Senate on January 5, 1949, and passed by that body February 1, 1950, by a vote of 64 to 27. All Democrats with four exceptions (Byrd and Robertson of Virginia, Johnson of Colorado, and Thomas of Oklahoma) voted for the proposal. The Republicans, however, were badly divided, with 23 led by Taft voting against the proposal and 18 led by Lodge voting for it.

The text of S. J. RES. 2, as introduced, with line by line explanation, can be found in 96 CONG. REC. 917 (Jan. 25, 1950; and as the Senate passed it at 96 *id.* at 1087 (Jan. 30, 1950). For Congressional debate and action on the proposal, also see 96 *id.* at 71 (Jan. 5, 1950), 908-20 (Jan. 25, 1950), 969-71, 981-5, 987-95 (Jan. 26, 1950), 1098-1101, 1108-10 (Jan. 30, 1950), 1174, 1176-91 (Jan. 31, 1950), 1289-1307 (Feb. 1, 1950). Sources of earlier discussion of this reform can be found in the index of volume 95 of the Congressional Record.

For newspaper material on this joint resolution see Hinton, *Senate Votes Plan to Allow Splitting of Electoral Votes*, N. Y. Times, Feb. 2, 1950, p. 1, col. 3; N. Y. Times, Feb. 5, 1950, § 4, p. 2, col. 5; Robichaud, *New Vote Plan Would Shuffle Political Map*, Chicago Sun-Times, Feb. 5, 1950, p. 13, col. 1, p. 18, cols. 1-5; Editorial, *Making Every Vote Count*, Chicago Sun-Times, Feb. 5, 1950, p. 35, cols. 1-2; Evansville (Indiana) Courier, Feb. 8, 1950, p. 8, col. 1; Hinton, *Electoral Change Sharply Debated*, N. Y. Times, Feb. 12, 1950, § 4, p. 7, col. 5; St. Louis Post-Dispatch, Feb. 27, 1950, p. 2B, col. 3. For a case against the proposed amendment by a professional political scientist, see Silva, *The Lodge-Gossett Resolutions A Critical Analysis*, 44 AM. POL. SCI. REV. 86-99, and the references therein.

⁵ The Equal Rights proposal was referred to the House Committee on the Judiciary, January 26, 1950. Although its adherents have sought to secure its discharge from this committee, it was still lodged there as recently as September 23, 1950. The Congressional Record index discloses no indication of any action having been taken on it since it was submitted to Committee on January 26. The Lodge-Gossett proposal was rejected by the House July 17, 1950 by a vote of 210 to 134. See 96 CONG. REC. 10572-88 (May 15, 1950), for the final debate and House action on it.

rences, and since ours is a world in which the rule of law is too little honored, it seems desirable to examine the historical significance of the provision for amending the Constitution, which is found in Article V, to enunciate the precedents and ideas which prompted the Framers to provide for amending the Constitution, and to trace the history of the writing and adoption of the amending provision.

II

There seems to be little, if any, doubt that one of America's principal contributions to political science is the idea that provision should be made for making legal changes in basic law. If government is derived from the consent of the governed, as we have believed in this country since long before the American Revolution, it follows naturally that revision and amendment of a written constitution springing from the people should be subject to change by them whenever they desire change. The fact that the people may be convinced that they have an ethical right to revolt against any government, even one of their own choosing, that denies them their guaranteed rights or the changes that they may decide have become essential, does not mean that they will frequently resort to revolution. We take that for granted, for frequent change through revolution is only for politically immature people, or for a people who find it necessary to use the last desperate avenue to freedom available to them. Therefore, most of the Framers apparently realized that a well-drawn constitution should provide for its own amendment so as to forestall as much as possible change by revolution.⁶ The United States led the way in this idea at a time when in the world at large "it was heresy to suggest the possibility of change in governments divinely established and ensured."⁷ With the United

⁶ FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* 135 (1941).

⁷ MERRIAM, *THE WRITTEN CONSTITUTION AND THE UNWRITTEN ATTITUDE* 6 (1931).

States having led the way, people nevertheless came only slowly to realize during the French Revolution that amending provisions were important. "Thereafter, in the nineteenth century," however, "constitutions were rarely made without some thought being given to this problem."⁸

III

The Colony of Pennsylvania had a provision in its charter for amendment and eight of the state constitutions between 1776 and 1787 contained amendment provisions.⁹ More importantly, the Articles of Confederation made provision for their alteration, but only by unanimous vote of the thirteen states.¹⁰ In view of these precedents, "it was almost inevitable . . . that when the Constitutional Convention assembled some plan of revision would be presented."¹¹ The Convention assembled on May 14, 1787, and during the next few weeks plans to improve the constitutional basis of the Government were presented by Charles Pinckney (May 29), Edmund Randolph (May 29), William Paterson (June 15) and Alexander Hamilton (June 18).¹²

⁸ See note 6 *supra*. For a study of nineteenth-century amending provision of various countries, see BORGEAUD, *ADOPTION AND AMENDMENT OF CONSTITUTIONS IN EUROPE AND AMERICA* (Hazen transl. 1895).

⁹ ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 1 (1942).

¹⁰ Article XIII of the Articles of Confederation provided in part that: "The Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration shall be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state." *DOCUMENTS OF AMERICAN HISTORY* 115 (5th ed. Commager 1949).

¹¹ See note 9 *supra*.

¹² The Virginia and New Jersey Plans, together with Hamilton's Plan, are easily available in COMMAGER, *op. cit. supra* note 10, at 134-8; FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 87-9, 225-32 (1913); and in *DRAFTING THE FEDERAL CONSTITUTION* 46-90 (Prescott ed. 1941).

Outstanding sources of information on the debates in the Constitutional Convention are: 1-4 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Farrand ed. 1937); FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* (1913), this being based upon 1-3 *id.*; MADISON, *JOURNAL OF THE FEDERAL CONVENTION* (Scott ed. 1898); and PRESCOTT, *op. cit. supra*.

Other sources of information on the history of the adoption of Article V are: BUTZNER, *CONSTITUTIONAL CHAFF—REJECTED SUGGESTIONS OF THE CONSTITUTIONAL CONVENTION OF 1787 WITH EXPLANATORY ARGUMENT* (1941), which has been com-

Pinckney proposed in Article XVI of his "Plan of a Federal Constitution," as Madison recorded it, the following:¹³

If two-thirds of the Legislatures of the States apply for the same, the Legislature of the United States shall call a convention for the purpose of amending the Constitution; or, should Congress, with the consent of two-thirds of each House, propose to the States amendments to the same, the agreement of two-thirds of the Legislatures of the States shall be sufficient to make the said amendments parts of the Constitution.

As Pinckney explained it, this article¹⁴

. . . proposes to declare, that if it should hereafter appear necessary to the United States to recommend the Grant of any additional Powers, that the assent of a given number of the States shall be sufficient to invest them and bind the Union as fully as if they had been confirmed by the Legislatures of all the States.

He greatly feared the requirement of unanimous consent to any change, as found in the Articles, because "it is to this unanimous consent the depressed situation of the Union is undoubtedly owing . . ." ¹⁵

The Virginia Plan, as presented by Randolph in the form of fifteen resolutions, contained its proposal for amendment in Resolution XIII, which provided as follows: "Resolved,

piled from the notes of Madison, Pierce, McHenry, King, and Yates; and ORFIELD, *op. cit. supra* note 9, at 1-6, who bases his study on 1-5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 (Elliot ed. 1863), the last volume (Vol. 5) of which is a revised edition of Madison's *Journal*.

¹³ MADISON, *op. cit. supra* note 12, at 72. Madison's version of the Pinckney Plan can be found, *id.* at 64-72. According to Farrand, however, "No authentic copy of the original [Pinckney] plan has ever been found." Prepared and offered by one of the youngest members of the Convention, the latter may have regarded Pinckney's action "as somewhat presumptuous." At any rate, in what appears to have been a purely formal way, Pinckney's plan was referred to the committee of the whole and did not form a subject of discussion at any time," although he was the author of many "minor points and details" that were finally embodied in the Constitution. See FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 71-2, 83, 123, 126, 128, 129, 199 (1913).

¹⁴ 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 120 (Farrand ed. 1937). Farrand indicates that Pinckney's explanation of this Article XVI was made on May 28, the day before he presented it to the Convention.

¹⁵ *Ibid.*

that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto.”¹⁶ When this proposition was taken up for discussion on June 5, Madison recorded that “Mr. Pinckney doubted the propriety or necessity of it.” Madison wrote, however, that “Mr. Gerry favored it,” since “the novelty and difficulty of the experiment,” to Gerry’s mind, required “periodical revision,” the prospect of which “would also give intermediate stability to the government,” for “nothing had yet happened in the States where this provision existed to prove its impropriety.”¹⁷

On June 11, Randolph’s proposition was again brought up for consideration, but according to Madison “several members did not see the necessity of the Resolution at all, nor the propriety of making the consent of the National Legislature unnecessary.”¹⁸ It was defended by Mason, however, who urged that such a provision was necessary. He believed that the plan adopted by the Convention would “certainly be defective, as the Confederation has been found on trial to be.”¹⁹ Therefore, he thought amendments would be necessary and that it would²⁰

. . . be better to provide for them in an easy, regular and constitutional way, than to trust to chance and violence. It would be improper to require the consent of the National Legislature, because they may abuse their power, and re-

¹⁶ MADISON, *op. cit. supra* note 12, at 63.

¹⁷ MADISON, *op. cit. supra* note 12, at 110. The index indicates that “Mr. Pinckney” in this case was General Charles Cotesworth Pinckney, Charles Pinckney’s older cousin, who was also a delegate from South Carolina. *Id.* at 793. Cf. BUTZNER, *op. cit. supra* note 12, at 131, who credits Charles Pinckney with this opinion, quoting him as saying that “provision for amending the Constitution should not be made. The propriety and necessity of it are doubtful.” *Id.* at 195. If Charles Pinckney did take this position when Randolph’s proposal for amending the Constitution was discussed on June 5, it certainly is confusing in the light of his own proposal of May 29. Either he changed his mind or was not accurately quoted. Perhaps all that he doubted at this time was the wisdom of not requiring the assent of the national legislature.

¹⁸ MADISON, *op. cit. supra* note 12, at 149.

¹⁹ *Ibid.*

²⁰ *Ibid.*

fuse their assent on that very account. The opportunity for such an abuse may be the fault of the Constitution calling for amendment.

Madison then reported that "Mr. Randolph enforced these arguments." Action was postponed on the words "'without requiring the consent of the National Legislature,'" while the other provisions in the clause were "passed, *nem. con.*" (without a dissenting vote) in the Committee of the Whole.²¹

The Paterson, or New Jersey, Plan did not propose a new method for changing the basic law, but continued "the extremely difficult amending process of the articles."²²

Hamilton, who took little part in the proceedings of the Convention until the middle of June, addressed the delegates at some length on June 18 and outlined his ideas of government. His plan, which differed radically from the plans of both Randolph and Paterson, was never formally before the Convention, and Madison, who reported it, does not appear to have reported it in its entirety.²³ Farrand, however, sets forth Hamilton's whole plan, which in its Article IX, Section 12, provided a proposal for the plan's amendment as follows:²⁴

This Constitution may receive such alterations and amendments as may be proposed by the Legislature of the United States, with the concurrence of two thirds of the members of both Houses, and ratified by the Legislatures of, or by Conventions of deputies chosen by the people in, two thirds of the States composing the Union.

²¹ *Ibid.*

²² PRESCOTT, *op. cit. supra* note 12, at 59.

²³ See MADISON, *op. cit. supra* note 12, at 175-87, for his report of Hamilton's remarks and outline of Hamilton's Plan. Farrand states that this plan was the "only important contribution" which Hamilton "made to the discussions of the convention." He adds that it "did not provoke discussion and it was not expected to. While the logic and consistency of his position were recognized, his ideas were too radical [conservative?] to meet with any general approval. As Johnson expressed it, 'the gentleman from New York . . . has been praised by everybody, he has been supported by none.'" FARRAND, *THE FRAMING OF THE CONSTITUTION* 87-9 (1913).

²⁴ 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 630 (Farrand ed. 1937). See 3 *id.* at 617-30 for Hamilton's entire plan and comments upon it.

The seventeenth resolution of the Committee of the Whole was "that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary."²⁵ Madison reported it as of June 19 and recorded that on July 23 (mistakenly printed as June 23) it "was agreed to, *nem. con.*" On July 26, in the nineteenth resolution on fundamentals, the matter was referred to the Committee of Detail, after which the Convention adjourned until August 6, that the Committee of Detail might have time to prepare and report the Constitution.²⁶

The various notes and draft versions of what was to become Article V are of real interest. In the notes of the Committee of Detail, for example, Farrand found this evidence of the Committee's work: "(An alteration may be effected in the articles of union, on the application of two thirds *nine* [2/3d] of the state legislatures [by a Convn.]) [on appln. of 2/3ds of the State Legislatures to the Natl. Leg. they call a Convn. to revise or alter ye Articles of Union]"²⁷ A search of James Wilson's papers produced this version: "This Constitution ought to be amended whenever such Amendment shall become necessary; and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that Purpose."²⁸

In the printed report of the Committee of Detail, which was presented by Rutledge on August 6, the amending provision was included as Article XIX (erroneously, because of an error in printing, as Article XVIII). "On the application of the Legislatures of two thirds of the States

²⁵ MADISON, *op. cit. supra* note 12, at 162.

²⁶ PRESCOTT, *op. cit. supra* note 12, at 686; MADISON, *op. cit. supra* note 12 at 409, 444-9. According to Madison, the Convention referred altogether twenty-three resolutions to the Committee of Detail together with Pinckney's and Patterson's Plans.

²⁷ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 148 (Farrand ed. 1937); 4 *id.* at 49-50.

²⁸ 2 *id.* at 159; for a similar draft version, see 2 *id.* at 174.

in the Union, for an amendment of this Constitution," this part of the report read, "the Legislature of the United States shall call a convention for that purpose."²⁹ When Article XIX was discussed in Convention on August 30, Gouverneur Morris "suggested that the legislature should be left at liberty to call a convention whenever they pleased," but "the article was agreed to," as reported by the Committee, "*nem. con.*"³⁰

The principal work of the delegates in Convention on September 10 involved the provision for amending the new constitution, Gerry moving at the outset to reconsider Article XIX.³¹ Since the Constitution was "to be paramount to the State Constitutions," he feared "that two-thirds of the States" might "obtain a Convention, a majority of which" could "bind the Union to innovations" that might "subvert the State Constitutions altogether." What he wanted to know was "whether this was a situation proper to be run into." Though Hamilton seconded Gerry's motion to reconsider, he said that he did so "with a different view from Mr. Gerry."³² Hamilton's views on the matter, as reported by Madison, indicate that he had no fear of the binding power of a majority of the states in a convention and that he was still convinced as on June 18 that real powers ought to be given the national legislature. Two-thirds of that body willing, it should have power to call a convention, whether the states made application or not. He believed that state legislatures would not "apply for alterations" except when they wanted to secure an increase of their powers; on the other hand, the national legislature would be especially able "to per-

²⁹ 2 *id.* at 188; also see MADISON, *op. cit. supra* note 12, at 461.

³⁰ PRESCOTT, *op. cit. supra* note 12, at 686.

³¹ On the action taken September 10, see 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 555-6 (Farrand ed. 1937); MADISON, *op. cit. supra* note 12, at 692-4; PRESCOTT, *op. cit. supra* note 12, at 686-8.

³² MADISON, *op. cit. supra* note 12, at 692.

ceive," and would "be most sensible, to the necessity of amendments."³³

In view of the later doubts and confusions regarding the functions and powers of a convention,³⁴ Madison's remarks on "the vagueness of the terms, 'call a convention' . . ." are especially interesting and revelatory of his insight into problems of government. In his opinion, "the vagueness of the terms" was "sufficient reason for reconsidering the article," for, he asked, "How was a convention to be formed?—by what rule decided?—what the force of its acts?"³⁵

Gerry's motion to reconsider the provision for amendment was carried, whereupon Sherman moved to add to the article the words "'or the Legislature may propose amendments to the several States for their approbation; but no amendments shall be binding until consented to by the several States.'"³⁶ Gerry seconded this motion. Wilson desired that the approval of only two-thirds of the states should be necessary and made a motion to that effect, but his motion was defeated by a vote of six to five.

³³ As Hamilton put it, according to Madison, "There was no greater evil in subjecting the people of the United States to the major voice than the people of a particular State. It had been wished by many, and was much to have been desired, that an easier mode of introducing amendments has been provided by the Articles of Confederation. It was equally desirable now, that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The State Legislatures will not apply for alterations; but with a view to increase their own powers. The National Legislature will be the first to perceive, and will be most sensible to, the necessity of amendments; and ought also to be empowered, whenever two-thirds of each branch should concur, to call a Convention. There could be no danger in giving this power, as the people would finally decide in the case." MADISON, *op. cit. supra* note 12, at 692-3; PRESCOTT, *op. cit. supra* note 12, at 687.

³⁴ See BERGEAUD, *op. cit. supra* note 8, at 178-80; DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 73, 77-8, 80, 87-8, 92, 94-6, 104, 115-6, 262-5 (1910); JAMESON, *THE CONSTITUTIONAL CONVENTION* 291, 295-6, 344, 394-5, 400-5 (3rd ed. 1873); McDONALD, *A NEW CONSTITUTION FOR A NEW AMERICA* 222, 230-1 (1921); McLAUGHLIN, *THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 101-3 (1932); Brown, *The Procedure of Amendment*, 185 *ANNALS* 85-6 (1936).

³⁵ MADISON, *op. cit. supra* note 12, at 693.

³⁶ *Ibid.*

Thereupon he moved that assent of three-fourths of the states be required, to which the members unanimously agreed.

Madison moved, with Hamilton seconding his motion, that consideration of the amended proposition should be postponed in order to take up a proposal very similar to that which was to become Article V. This proposal differed from Article V only in that as Madison introduced it the words "the legislature of the United States" were used instead of "the Congress," the national legislature was to propose amendments "on the application of two-thirds of the legislatures of the several states" (instead of being under obligation to call a convention in such circumstances), and there were no provisos included. Rutledge, however, did not like it as it stood, because "he never could agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property, and prejudiced against it."³⁷ It was to obviate this objection that the proviso was added "that no amendments, which may be made prior to the year 1808 shall in any manner affect the fourth and fifth sections of the seventh article."³⁸ This was agreed to and Madison's proposition, as amended, was passed with nine votes in the affirmative, one in the negative, and one divided. It was this proposal which was referred to the Committee

³⁷ *Id.* at 693-4.

³⁸ These sections later became "the first and fourth Clauses in the Ninth Section of the first Article," according to the organization of the Constitution as later adopted. By the first clause, U. S. CONST. ART. I, § 9, "the Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." The fourth clause, U. S. CONST. ART. I, § 9, was to provide that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." As sections four and five of Article VII as reported by the Committee of Detail, these sections were more simply worded than as adopted in the Constitution. They can be found in MADISON, *op. cit.* *supra* note 12, at 455.

of Style and Arrangement and which with very minor changes was reported by that Committee as Article V.³⁹

Sherman did not like Article V as it came from the Committee of Style and Arrangement, and when the matter was discussed on the floor of the Convention on September 15, just before the final approval, he expressed his fears. What he feared was "that three-fourths of the States might be brought to do things fatal to particular States; as abolishing them altogether, or depriving them of their equality in the Senate." Therefore, "He thought it reasonable that the proviso in favor of the States importing slaves should be extended, so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate."⁴⁰ Mason believed that the proposed plan for amending the Constitution was "exceptionable and dangerous," for since the proposing of amendments depended on Congress either "immediately" or "ultimately," he foresaw that "no amendments of the proper kind, would ever be obtained by the people, if the government should become oppressive, as he verily believed would be the case."⁴¹

³⁹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 578, 602 (Farrand ed. 1937). Madison made some minor changes in the Committee's draft in the interest of clarity. See 2 *id.* at 602. From the Jefferson Papers and in the handwriting of Jefferson there comes a story credited to Mason that Gouverneur Morris, by a parliamentary trick (apparently while the Constitution was still in the hands of the Committee on Style and Arrangement) made an effort to secure the adoption of Article V worded in such a way as to give Congress the exclusive power of proposing amendments. 3 *id.* at 367-8.

⁴⁰ MADISON, *op. cit. supra* note 12, at 737.

⁴¹ For the views of Sherman and Mason, see *id.* at 737; PRESCOTT, *op. cit. supra* note 12, at 689. It is interesting to notice that Mason wrote in the margin of his copy of the Committee's draft of September 12 of Article V: "Article 5th—By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 629 n. 8 (Farrand ed. 1937). For a somewhat different form of this note, see 4 *id.* at 61.

Gouverneur Morris and Gerry moved to amend Article V so that a convention might be called on application of two-thirds of the states, but Madison "did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a Convention on the like application."⁴² He had no objection to making provisions for a convention that might propose amendments, but he did foresee, as he had previously, "that difficulties might arise as to the form, the quorum, &c., which in constitutional regulations ought to be as much as possible avoided."⁴³ The motion to amend to provide for a convention was passed without dissent, the wording being such as to require Congress to call a convention upon application by two-thirds of the States.⁴⁴

Sherman, at this stage still fearful of what three-fourths of the states might do, moved to strike out of Article V the minimum requirement of a three-fourths majority of the states in ratifying amendments, thus "leaving future conventions to act in this matter like the present Convention, according to circumstances." What he really wanted was to require ratification by *all* states.⁴⁵ This motion failed, whereupon Gerry moved to strike out the words "'or by conventions in three-fourths thereof.'" Gerry's motion failed by a vote of ten to one. Sherman, who had previously expressed himself on the matter, now sought to secure annexation to Article V the proviso "'that no State shall, without its consent, be affected in its internal police, or deprived of its equal suffrage in the Senate.'" Madison objected, pointing out that the incorporation of such special provisos in the Article would result in every state insisting on them, "for their boundaries, exports, &c." The motion fell by a vote of eight

⁴² MADISON, *op. cit. supra* note 12, at 737.

⁴³ *Ibid.*

⁴⁴ FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 190 (1913).

⁴⁵ ORFIELD, *op. cit. supra* note 9, at 5-6.

to three, whereupon Sherman moved to strike out Article V in its entirety.⁴⁶ This was seconded by Brearley and voted for by Connecticut and New Jersey. Eight States voted against it, however, while one state, Delaware, was divided in its vote. Gouverneur Morris then moved to annex the proviso "that no State, without its consent, shall be deprived of its equal suffrage in the Senate." According to Madison, this motion was "dictated by the circulating murmurs of the small States" and "was agreed to without debate, no one opposing it, or, on the question, saying, no."⁴⁷

⁴⁶ MADISON, *op. cit. supra* note 12, at 738. Had Sherman's proposal *re* internal police power been adopted, according to ORFIELD; *op. cit. supra* note 9, at 86-7, "a clear and comprehensive limitation would have been placed on the amending process as relating to interference of any kind with the powers of the states." In arguing his case in *New Jersey v. Palmer*, one of the national prohibition cases, 253 U. S. 350, 40 S. Ct. 486, 64 L. Ed. 947, 960 (1920), Attorney-General McCran of New Jersey contended that "the fact that the phrase concerning the internal police of the states was omitted, and that the phrase that no state should be deprived of its equal suffrage in the Senate was included, is not an argument . . . that it was intended thereby to be so read as to permit an amendment to the Constitution tending or effectuating the destruction of the internal police powers of complainant."

⁴⁷ MADISON, *op. cit. supra* note 12, at 738-9. Yet Madison, according to Rufus King's notes as recorded in Farrand, feared that equal suffrage in the Senate might prevent amendments in the future. When Oliver Ellsworth of Connecticut recommended that each state should have equality in the Senate, Madison responded with conviction, remarking: "The Gentleman from Connecticut has proposed doing as much at this Time as is prudent, and leav. future amendments to posterity—this is dangerous Doctrine—the Defects of the Amphictionick League were acknowledged, but they never cd. be reformed. The U. Netherlands have attempted four several Times to amend their Confederation, but have failed in each Attempt—The fear of Innovation, and the Hue & Cry in favor of the Liberty of the people will prevent the necessary Reforms—If the States have equal, influence, and votes in the Senate, we are in the utmost Danger—Delaware during the War opposed and defeated an Embargo agreed to by 12. States; and continued to supply the Enemy with provisions during the war." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 478 (Farrand ed. 1937).

Wilson opposed state equality early in the Convention. EDWARD ELLIOTT, BIOGRAPHICAL STUDY OF THE CONSTITUTION 62-3 (1910). Gouverneur Morris stated that the small states originally secured their equality of position in the Government by extortion. Hamilton asserted that in arguing for equality the small states were struggling "for power, not for liberty." See MADISON, *op. cit. supra* note 12, at 266. Cf. BRANT, STORM OVER THE CONSTITUTION 103-4 (1936). The small state view, as it is most usually described, was ably set forth in the Senate by Jonathan Dayton of New Jersey on November 24, 1803. See his statement as reported: 2 ANNALS OF CONG. 100-1 (1804), quoted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 400-1 (Farrand ed. 1937).

It is interesting to note that, according to Madison's testimony in the Virginia ratifying convention while refuting Patrick Henry's arguments, Jefferson

The completed provision for amending the Constitution was finally approved on September 17, the day on which the engrossed copy of the completed Constitution was read and signed. Article V, as approved on that day, and as it now stands in the Constitution, is as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures in three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress; Provided that no Amendment which may be made prior to the Year one thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Of at least passing interest is the fact that when the Confederate States of America adopted their constitution in 1861, they made provision for its amendment in its Article V. This article differed from its namesake in the United States Constitution, however, in that Congress was to summon a convention to propose amendments upon application of *three* states, this to be the exclusive method of proposal, and ratification was to be by legislatures or conventions of *two-thirds* of the states, the mode to be

was "captivated with the equality of suffrage in the Senate." On the other hand, as Madison put it at that time, Henry called it "the rotten part" of the Constitution. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 329 (Jonathan Elliot ed. 1863).

Professor Andrew C. McLaughlin points out that "the suggestion of solving the problem by granting equal representation of the states in the Senate was adopted, partly because of a belief that with the instrument of an equal vote the states could defend themselves. . . . And here is the amazing and amusing fact: at a later time the Convention gave up what was apparently the central idea of this famous compromise; the senators were to be allowed to vote per capita, and not by states. Furthermore, the Senate did not prove to be in the succeeding decades the particular guardian of states' rights. . . ."McLAUGHLIN, *op. cit. supra* note 34, at 160-1.

determined by the general convention. The amending power was limited by the familiar provision that "no State shall, without its consent, be deprived of its equal representation in the Senate."⁴⁸

The Convention sent the completed Constitution to the Congress, which received it "with remarkable composure, considering the fact that by transmitting the instrument to the states it was decreeing its own demise."⁴⁹ Copies of the Constitution were sent to the state legislatures by authority of the resolution of September 28, 1787, "in order to be submitted to a Convention of delegates chosen in each state, by the people thereof, in conformity to the resolves of the Convention made and provided in that case."⁵⁰

As the Constitution went to the states, public men got ready for bitter battles, for there were many objections to the new document, as is well known. In the state conventions it was criticised clause by clause, Article V included. It was likewise defended clause by clause by the Federalists who described Article V as providing a means for making changes which might be desirable in the years ahead. Indeed, the promise of immediate amendments providing a bill of rights was all that secured the ratification of the Constitution in some of the states.⁵¹ Pro and con opinion concerning the amending process reveals typical attitudes toward the Constitution at the time it was adopted, as well as later.

Edmund Randolph, who along with Mason of Virginia, Gerry of Massachusetts, and Martin of Maryland, refused to sign the Constitution as it left the hands of the Framers in Philadelphia, expressed himself on this matter in a

⁴⁸ COMMAGER, *op. cit. supra* note 10, at 384.

⁴⁹ Martig, *Amending the Constitution—Article V: the Keystone of the Arch*, 35 MICH. L. REV. 1253, 1261 (1937).

⁵⁰ 1 JONATHAN ELLIOT, *op. cit. supra* note 47, at 319.

⁵¹ 1-4 *id.*, *passim*; McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 230 n. (1936).

letter to the Speaker of the Virginia House of Delegates, dated October 10, 1787. In this he set forth his reasons for not signing. It will be recalled that at Philadelphia, Randolph, like Mason, did not like the proposed role of Congress in the amending process, fearing that it might subvert the will of the people. He further believed, he said in his letter to the Virginia Speaker, "that it is better to amend, while we have the constitution in our power, while the passions of designing men are not yet enlisted, and while a bare majority of the States may amend [*i.e.*, apparently in the second constitutional convention which he thought should be called to consider amendments proposed by the state conventions] than to wait for the uncertain assent of three fourths of the States." Moreover, "a bad feature in government becomes more and more fixed every day." Of course, he said, "frequent changes of a constitution, even if practicable, ought not to be wished, but avoided as much as possible;" however, "in the present case, it may be questionable, whether after the particular advantages of its operation shall be discerned, three fourths of the states can be induced to amend. . . ." ⁵²

Patrick Henry, who had refused to go to the Philadelphia Convention, led the attack on the Constitution in the Virginia Convention. Vitriol and sarcasm characterized his attack. "To encourage us to adopt" the Constitution, he said, "they tell us that there is a plain, easy way of getting amendments. When I come to contemplate this part, I suppose that I am mad, or that my countrymen are so.

⁵² 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 126-7 (Farrand ed. 1937). Interestingly enough, Randolph finally voted for ratification (though not his colleagues Mason or the fiery Patrick Henry), explaining that Virginia's delay (until June 2, 1788) and the adoption of the Constitution by eight states in the meantime—and that in his opinion those eight states would "not recede"—had caused him to decide to vote for ratification. "I am," he said, "a friend of the Union." 3 JONATHAN ELLIOT, *op. cit. supra* note 47, at 29, 652. A recent writer claims that Randolph, who at the outset favored a strong central government, at some point decided that the new government was too powerful and thus turned against the document he had helped frame. BRANT, *op. cit. supra* note 47, at 77, 92-3, 117.

The way to amendment is, in my conception, shut. Let us consider this plain, easy way. . . .” Pointing out that three-fourths of the states would have to agree upon ratification of any proposed amendment, he complained that “in such numerous bodies, there must necessarily be some designing, bad men. To suppose that so large a number as three fourths of the states will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous.” Yet, it was perhaps unnecessary to worry about ratification, because, “however uncharitable it may appear, . . . I must tell my opinion—that the most unworthy characters may get into power, and prevent the introduction of amendments.”⁵³

Edmund Pendleton, president of the Virginia Convention, on the other hand, thought the amendatory provision “an easy mode of removing any errors which shall have been experienced.” He added: “In this view, then, I think we may safely trust in the government.”⁵⁴ Earlier, Madison had defended Article V by explaining it in *The Federalist*, No. 43.⁵⁵

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation

⁵³ 3 JONATHAN ELLIOT, *op. cit.* *supra* note 47, at 48-9 n. With Mason and a few others, McLaughlin says, Henry “assaulted—there is no better word—provision after provision of the new Constitution.” McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 205 (1936).

⁵⁴ 3 JONATHAN ELLIOT, *op. cit.* *supra* note 47, at 303.

⁵⁵ THE FEDERALIST, No. 43 at 286-7 (Modern Library ed. 1937).

in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality. The other exception [regarding the slave trade and direct taxes] must have been admitted on the same considerations which produced the privilege defended by it.

James Iredell, who was later to become a Supreme Court Justice,⁵⁶ strongly championed Article V in the North Carolina Convention, declaring that the omission of an amendment provision would be a great "misfortune," but that its inclusion⁵⁷

. . . is one of the greatest beauties of the system, and should strongly recommend it to every candid mind. The Constitution of any government which cannot be regularly amended when its defects are experienced, reduces the people to this dilemma—they must either submit to its oppressions, or bring about amendments, more or less, by a civil war. Happy this, the country we live in! The Constitution before us, if it be adopted, can be altered with as much regularity, and as little confusion, as any act of Assembly; not, indeed, quite so easily, which would be extremely impolitic; but it is a most happy circumstance, that there is a remedy in the system itself for its own fallibility, so that alterations can without difficulty be made, agreeable to the general sense of the people.

Such were some of the views of Article V, pro and con, at the time the Constitution was being considered. It was, of course, adopted along with the rest of the Constitution. It since has had noted and sometimes inspired defenders which is not to say, however, that it has always been approved.⁵⁸ In *Chisholm v. Georgia*, Justice Cushing said

⁵⁶ See note 39 *supra*.

⁵⁷ 4 JONATHAN ELLIOT, *op. cit. supra* note 47, at 176-7. In first addressing the chair on the subject of Article V, Iredell said that "the misfortune attending most constitutions which have been deliberately formed, has been, that those who form them thought their wisdom equal to all possible contingencies, and that there could be no error in what they did. The gentlemen who framed this Constitution thought with much more diffidence of their capacities, and undoubtedly, without a provision for amendment it would have been justly liable to objection, and the characters of its framers would have appeared much less meritorious. This, indeed, is one of the greatest beauties of the system. . . ." *Ibid*; also quoted in ORFIELD, *op. cit. supra* note 9, at 117 n. 75.

⁵⁸ Towards the end of the last century Professor John W. Burgess of the Columbia University School of Political Science wrote that he could not sym-

that "if the Constitution is found inconvenient in practice in . . . any . . . particular, it is well that a regular mode is pointed out for amendment."⁵⁹ Later, in 1840, Judge Joseph Story wrote, with reference to Article V, that:⁶⁰

The importance of this power can scarcely be overestimated. It is obvious that no human government can ever be perfect; and it is impossible to foresee, or guard against all the exigencies, which may, in different ages, require changes in the powers and modes of operation of a government. . . . A government, which has no mode prescribed for any changes, will, in the lapse of time, become utterly unfit for the nation. It will either degenerate into a despotism, or lead to revolution, by its oppressive inequalities. It is wise, therefore, in every government, and especially in a republic, to provide peaceable means for altering and improving the structure, as time and experience shall show it necessary, for the public safety and happiness. But, at the same time, it is equally important to guard against too easy and frequent changes. . . .

pathize "with that unreserved commendation of the fifth article of the Constitution indulged in by Mr. Justice Story [see the text at n. 60, *infra*] and other commentators. When I reflect that, while our natural conditions and relations have been requiring a central government, not a single step has been taken in this direction through the process of amendment prescribed in that article, except as the result of the civil war, I am bound to conclude that the organization of the sovereign power within the constitution has failed to accomplish the purpose for which it was constructed." MERRIAM, *op. cit. supra* note 7, at 20-1, quoting 1 BURGESS, POLITICAL SCIENCE AND COMPARATIVE LAW 150 (1891).

⁵⁹ 2 Dall. 468 (U. S. 1793); also quoted by ORFIELD, *op. cit. supra* note 9, at 117 n. 75.

⁶⁰ STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 246-7 (1842). Story added, however, a word of caution: "But, at the same time, it is equally important to guard against too easy and frequent changes; to secure due deliberation and caution in making them; and to follow experience, rather than speculation and theory. A Government, which is always changing and changeable, is in a perpetual state of internal agitation, and incapable of any steady and permanent operations. It has a constant tendency to confusion and anarchy." *Id.* at 247. ORFIELD, *op. cit. supra* note 9, at 117 n. 75, quotes from 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 575 (4th ed. 1873), as follows: "In regard to the Constitution of the United States, it is confessedly a new experiment in the history of the nations. Its framers were not bold enough or rash enough to believe, or to pronounce it to be perfect. . . . They believed, that the power of amendment was, if one may so say, the safety-valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self-destruction."

In the early part of our own century, in *Kansas v. Colorado*, Justice Brewer declared that:⁶¹

The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances that might call for the exercise of further national powers than those granted the United States, and, after making provision for an amendment to the Constitution by which any additional powers would be granted, they reserved to themselves all powers not so delegated.

But perhaps the best defense and statement of the significance of Article V that has ever been made is that which Professor Merriam made in a lecture on the Cutler Foundation at the University of Rochester almost twenty years ago. From the point of view of the eighteenth-century world in which it was written, Merriam said, the Constitution was "revolutionary in spirit. . . . It was the work of political realists, who were undertaking an experiment, not writing a conclusion and a finality." But, besides this, the Framers, he declared:⁶²

. . . recognized that the Constitution they adopted was not perfect but must be changed from time to time, as conditions altered, and they made definite provisions for amendment. . . . That the Constitution was made difficult to amend was not due to the desire to prevent democratic change, but to the jealousy of the states, who feared the conditions they had exacted in a series of painful compromises might be swept away by a bare majority of their sister states. . . . The important fact historically is not that amendment was made difficult, but that any provision was made for orderly change. . . .

The fact that in the United States more constitutional change has resulted from judicial and administrative interpretation, statutory elaboration, and custom and usage than from formal constitutional amendment does not detract from the great contribution the Framers made to political

⁶¹ 206 U. S. 46, 90, 27 S. Ct. 655, 51 L. Ed. 956 (1907); also quoted in ORFIELD, *op. cit. supra* note 9, at 117 n. 75.

⁶² MERRIAM, *op. cit. supra* note 7, at 6-7.

science when they provided a legal process for altering the Constitution, for there are some alterations in our government—*e.g.*, alterations in the structure of the government—which can only be made by formal amendment. As we grope our way through the difficult times that are upon us, it can be expected that we will utilize the amending process in our search for institutional changes by which we can adapt our government to a changing world. Although the amending process which Article V provides may not be perfect,⁶³ we have reason to be grateful to the Framers for having produced, through compromise, an amendatory provision which is far from unworkable.

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⁶³ The writer believes, for one thing, that constitutional amendment is such a function of sovereignty that amendments should always (instead of rarely) be ratified by at least popularly elected conventions, as was the amendment repealing prohibition.

The documentary history of the ratification of this amendment can be traced in BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1938); REP. DEP'T. STATE No. 573, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1934).